ICM Trading Sdn Bhd v Perniagaan Azman Bersaudara

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–12–51 OF 2004
LOW HOP BINGJ
23 NOVEMBER 2005

Civil Procedure — Summary judgement — Appeal — Statement of claim prays for a different amount from the application — Whether in good order

This is the appellant-plaintiff's ('the plaintiff's') appeal against the decision of the learned sessions court judge who had on 23 July 2004 dismissed the plaintiff's notice of application for summary judgment against the defendant. The plaintiff is a company which has been selling and delivering goods to the defendant on a 30-day credit at the request of the defendant since December 2001, in consideration of the payment by the defendant of a deposit of RM5,000 with the plaintiff. The defendant had made part payments to the plaintiff for these orders, thereby leaving an outstanding balance of RM33,761.05 as at 15 November 2002. The plaintiff's solicitors had on that date issued a notice of demand to the defendant. The defendant had neither responded nor objected thereto. Instead, the defendant had started making five instalment payments amounting to RM3,650 in May 2003. Thereafter, the defendant stopped making any further payment. The new balance outstanding was RM30,111.05 as at 23 July 2003. Subsequently, the plaintiff filed the instant summons against the defendant to recover the new outstanding sum of RM30,111.05. On 31 July 2003, the said deposit of RM5,000 was credited to the defendant's outstanding account with the plaintiff, thereby bringing the latest outstanding sum to RM25,111.05 which was the subject matter of the plaintiff's application for summary judgment under O 26A of the Subordinate Courts Rules 1980. The defendant submitted that the plaintiff's statement of claim prays for RM30,111.05 while the notice of application is asking for summary judgment in the sum of RM25,111.05, and that as the statement of claim was not amended, summary judgment should not be entered. The defendant also contended that the plaintiff was unsure that the goods had been delivered to the defendant and so summary judgment should not have been entered. The contention for the plaintiff is that the notice of application has specified the sum of RM25,111.05 after taking into account the sum of RM5,000 credited by way of the defendant's deposit with the plaintiff. The plaintiff contended that the defendant at all material time had never complained of any non-delivery of the goods.

Held, allowing the appeal with costs:

(1) The plaintiff has applied for summary judgment to be entered in relation to the outstanding sum after taking into consideration the deposit of RM5,000 placed by the defendant with the plaintiff. This is perfectly in good order.

Had the plaintiff not deducted the sum of RM5,000 from the amount prayed for in the statement of claim, the defendant would have raised the issue that the deposit must indeed be taken into account, by way of deduction to arrive at the sum of RM25,111.05 as stated in the plaintiff's notice of application (see para 12).

(2) If at all the defendant had not received the goods, what was the need for the defendant to make part payment thereof, followed by five instalment payments and then an abrupt cessation of the payment. If these goods had indeed not been received by the defendant, there could have been no doubt that this crucial issue would have been raised in the statement of defence specifically and not by way of bare denials without condescending upon particulars (see paras 21, 26).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu-plaintif ('plaintif') terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah pada 23 Julai 2004 menolak notis permohonan plaintif untuk penghakiman terus terhadap defendan. Plaintif adalah sebuah syarikat yang menjual dan menghantar-serah barangan kepada defendan di atas kredit 30 hari atas permintaan defendan semenjak Disember 2001, di mana sebagai balasan pembayaran oleh defendan atas deposit RM5,000 dengan plaintif. Defendan telah membuat pembayaran sebahagian kepada plaintif untuk pesanan-pesanan ini, dan masih terdapat bayaran yang tertunggak sebanyak RM33,761.05 setakat 15 November 2002. Peguamcara plaintif telah pada tarikh tersebut mengeluarkan satu notis tuntutan kepada defendan. Defendan tidak menjawab ataupun membuat bantahan. Sebenarnya, defendan telah mula membuat bayaran melalui lima bayaran ansuran yang kesemuanya berjumlah RM3,650 pada Mei 2003. Kemudian dari itu, defendan telah berhenti daripada membuat bayaran yang selanjutnya. Tunggakan bayaran yang baru ialah RM30,11.05 setakat 23 Julai 2003. Selanjut dari itu, plaintif telah memfailkan saman ini terhadap defendan untuk mendapat kembali jumlah baru RM30,11.05 tersebut. Pada 31 Julai 2003, deposit RM5,000 tersebut telah dikreditkan kepada akaun tunggakan defendan dengan plaintif, yang menjadikan jumlah tunggakan yang terbaru sebanyak RM25,111.05 dan menjadi subjek permohonan plaintif untuk penghakiman terus di bawah A 26A Kaedah-kaedah Mahkamah Rendah 1980. Defendan berhujah bahawa penyata tuntutan plaintif yang memohon untuk RM30,111.05 sementara notis permohonan untuk penghakiman terus adalah untuk jumlah RM25,111.05, dan penyata tuntutan tidak dipinda, maka penghakiman terus tidak boleh dimasukkan. Defendan juga menyatakan bahawa plaintif tidak pasti sama ada barangan telah dihantar serah kepada defendan dan dengan itu penghakiman terus tidak patut dimasukkan. Plaintif berhujah bahawa notis permohonan adalah untuk jumlah tertentu iaitu RM25,111.05 setelah mengambil kira jumlah RM5,000 yang dikreditkan melalui deposit defendan dengan plaintif. Plaintif juga berhujah bahawa defendan telah pada kesemua masa yang material tidak pernah beradu akan sebarang barangan yang tidak dihantar serah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Plaintif telah memohon satu penghakiman terus dimasukkan berhubungan dengan jumlah yang belum dibayar setelah mengambil kira deposit RM5,000 yang diberikan oleh defendan kepada plaintif. Ini adalah betul. Sekiranya plaintif tidak menolak jumlah RM5,000 daripada jumlah yang dituntut di dalam penyata tuntutan, defendan akan membangkitkan isu bahawa deposit tersebut seharusnya diambil kira, dengan menolak deposit tersebut dan mendapatkan jumlah RM25,111.05 seperti yang dinyatakan di notis permohonan plaintif (lihat perenggan 12).

(2) Sekiranya benar defendan tidak menerima barangan tersebut, kenapa ia harus membuat pembayaran sebahagian, diikuti dengan lima bayaran ansuran dan kemudiannya secara tiba-tiba berhenti membuat bayaran. Sekiranya benar barangan ini tidak diterima oleh defendan, tanpa ragu-ragu isu penting ini seharusnya dibangkitkan di penyata pembelaan secara spesifik dan bukannya setakat penafian kosong sahaja tanpa menyatakan butir-butir (lihat perenggan 21, 26).]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6070–6188.

Cases referred to

Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd [2003] 4 MLJ 441 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
British American Life & General Insurance Bhd v Pembinaan Fal Bhd & Ors [1994] 3 MLJ 267 (refd)
Chai Koh Shin v Lam Guan Chan Pte Ltd [2002] 1 LNS 30 (refd)
Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139 (refd)
Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd [1998] 6 MLJ 38 (refd)
Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134 (folld)
Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, third party) [1989] 1 MLJ 321 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Ong & Co Pte Ltd v Foo Sae Heng [1990] 2 MLJ 85 (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd and another appeal [1993] 1 MLJ 316 (refd)
Shell Malaysia Trading Sdn Bhd v Filotek Trading Sdn Bhd [1999] 8 CLJ 592 (refd)
SJ Securities Sdn Bhd v Sahara bte Harun Civil Suit No 22-10 of 1995 High Court Shah Alam, 2(3) Mallal's Digest (4th Ed) para 5893 (refd)
Tan Cheng Hock v Chan Thean Soo & Anor [1987] 2 MLJ 479 (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283 (refd)

Legislation referred to

Rules of the High Court 1980 O 14
Subordinate Courts Rules 1980 O 26A

Mohamed Musthafa (Abdul Aziz Rahim & Co) for the plaintiff.
Normila bte Hussain (Zulfiqri Zakaria & Co) for the defendant.

Low Hop Bing J:

APPEAL

[1] This is the appellant-plaintiff's ('the plaintiff's') appeal against the decision of the learned sessions court judge who had on 23 July 2004 dismissed the plaintiff's notice of application for summary judgment against the defendant.

FACTUAL BACKGROUND

[2] Plaintiff is a company which has been selling and delivering goods to the defendant on a 30-day credit at the request of the defendant since December 2001, in consideration of the payment by the defendant of a deposit of RM5,000 with the plaintiff.

[3] From time to time, the defendant had placed orders with the plaintiff for the supply of building materials including concrete. Upon receiving the defendant's orders for the supply of the goods, the plaintiff would in turn place orders for the same from a third party, ie Lafarge Supermix Concrete. Upon delivery of the goods by the third party, the third party would obtain the signature of the recipient i.e. the defendant or its representative, after which the third party would proceed to the plaintiff's office to endorse the orders with the plaintiff's chop in order to show that the plaintiff has ordered the goods from the third party. These arrangements had all along been transacted and completed without a hitch.

[4] The defendant had made part payments to the plaintiff for these orders, thereby leaving an outstanding balance of RM33,761.05 as at 15 November 2002. As the defendant has failed, refused or neglected to pay this outstanding balance, the plaintiff's solicitors had on that date issued a notice of demand to the defendant. The defendant has neither responded nor objected thereto. Instead, the defendant had started making five instalment payments amounting to RM5,650 in May 2003. Thereafter, the defendant stopped making any further payment. The new balance outstanding was RM30,111.05 as at 23 July 2003.

[5] Subsequently, the plaintiff filed the instant summons against the defendant to recover the new outstanding sum of RM30,111.05.

[6] On 31 July 2003, the said deposit of RM5,000 was credited to the defendant's outstanding account with the plaintiff, thereby bringing the latest outstanding sum

to RM25,111.05 which was the subject matter of the plaintiff's application for summary judgment under O 26A of the Subordinate Courts Rules 1980.

PRELIMINARY OJECTION

[7] defendant's learned counsel Miss Normila bte Hussain raised a preliminary objection to the effect that the appeal record filed by the plaintiff was incomplete as it did not contain a delivery note filed in the court below.

[8] Mr Mohamed Musthafa learned counsel for the plaintiff replied that the appeal record was complete.

[9] On my part, I find that the defendant's submission consists of a mere allegation, without specifying which particular delivery note has been left out. The defendant's allegation has failed to condescend upon particulars. I am therefore unable to see any substance in this submission.

DIFFERENT SUMS

[10] It was submitted for the defendant that the plaintiff's statement of claim prays for RM30,111.05 while the notice of application is asking for summary judgment in the sum of RM25,111.05, and that as the statement of claim was not amended, summary judgment should not be entered. Support was sought in *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 (HC); *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd and another appeal* [1993] 1 MLJ 316 (HC); *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA); and *British American Life & General Insurance Bhd v Pembinaan Fal Bhd & Ors* [1994] 3 MLJ 267 (HC).

[11] The contention for the plaintiff is that the notice of application has specified the sum of RM25,111.05 after taking into account the sum of RM5,000 credited by way of the defendant's deposit with the plaintiff, relying on *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134 (SC).

[12] The above submissions revolved around the two different amounts stated in the plaintiff's statement of claim and the notice of application. Upon a proper perusal of paras 16 and 17 of the plaintiff's affidavit in support, it is abundantly clear to me that the sum of RM25,111.05 specified in the plaintiff's notice of application is the outstanding sum after crediting the defendant's deposit of RM5,000 as alluded to above. In my view, this is perfectly in good order as the plaintiff has applied for summary judgment to be entered in relation to the outstanding sum after taking into consideration the deposit of RM5,000 placed by the defendant with the plaintiff. Had the plaintiff not deducted the sum of RM5,000 from the amount prayed for in the statement of claim, the defendant would have raised the issue that the deposit must indeed be taken into account, by way of deduction to arrive at the sum of RM25,111.05 as stated in the plaintiff's notice of application.

[13] An authority in point is to be found in *Krishnamurthy* where the plaintiff took out a summons in chambers under O 14 of the Rules of the High Court 1980 to sign final judgment but for a smaller sum as the plaintiff had explained that credit had to be given for the value of cars repossessed. The defendant argued that no summary judgment could be given when the amount claimed differed from the amount to be signed for summary judgment. The learned registrar upheld the defendant's contention, but on appeal, VC George J (later JCA) accepted the plaintiff's explanation to the above effect and held that there was no need for the statement of claim to be amended to make this adjustment. This was approved by the then Supreme Court through the judgment of Salleh Abas LP (as he then was) at p 543.

[14] I would now consider the authorities cited for the defendant.

[15] In *Kiwi Brands*, the plaintiff's application for summary judgment was based on the defendant's alleged infringement of plaintiff's copyright. The judgment of Abdul Malik Ishak J does not concern the contention presented for the defendant herein.

[16] The judgment of Lim Beng Choon J (as he then was) in *Pembinaan KSY* and the judgment of Richard Talalla J (as he then was) in *British American Life General Insurance* have nothing to do with the defendant's contention herein.

[17] In the circumstances, I am unable to accept the defendant's above contention.

DELIVERY OF THE GOODS

[18] This reflects the final contention for the defendant. It says in essence that the plaintiff was unsure that the goods had been delivered to the defendant and so summary judgment should not have been entered, relying on *Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, third party)* [1989] 1 MLJ 321; and *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC).

[19] It was submitted for the plaintiff that the defendant at all material time had never complained of any non-delivery of the goods although the plaintiff had, in addition to the delivery notes, rendered invoices, statements of account and notices of demand to the defendant, thereby amounting to an admission by the defendant: *Chai Koh Shin v Lam Guan Chan Pte Ltd* [2002] 1 LNS 30 (HC); *Ong & Co Pte Ltd v Foo Sae Heng* [1990] 2 MLJ 85 (HC Singapore); and *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400.

[20] In my judgment, I would first of all refer to the principles set out by Mohd Azmi SCJ (as he then was) who delivered the majority judgment for the then Supreme Court in *Bank Negara Malaysia* as follows:

(1) In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also a triable issue; and

(2) The duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other party in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision, or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

[21] It seems to me that the submission presented for the defendant is somewhat naive besides being inherently improbable. If at all the defendant had not received the goods, what was the need for the defendant to make part payment thereof, followed by five instalment payments and then an abrupt cessation of the payment.

[22] The judgment of VC George J (later JCA) in *Lin Securities (Pie) Ltd*, cited for the defendant did not advert to the issue of non-delivery of goods. In fact the subject matter of the litigation there concerns the purchase of shares quoted in the Singapore Stock Exchange which involved difficult questions of law, one of which was whether Singapore law applies. The appeal before me revolves around the simple and straightforward transactions of goods sold and delivered.

[23] Again in *UMBC*, the application for summary judgment was in relation to the sale of shares. Several issues were raised viz pertaining to the genuineness of the sale of shares deposited with third parties, restructuring of companies and a scheme of arrangement. The trial Judge gave the defendant conditional leave to defend. That was affirmed by the judgment of Raja Azlan Shah Ag LP (now HRH the Sultan of Perak) delivered for the Federal Court. The complexities of the issues there did not find any parallel in the appeal before me.

[24] Indeed, the factual background herein, in particular the absence of any protest or denial by the defendant constitutes an admission of the plaintiff's claim: see *Chai Koh Shin* per Zakaria Bin Sam JC (now J).

[25] In *Ong & Co Pie Ltd*, Chao Hick Tin JC of the Singapore High Court held, inter alia, that by not objecting to the documents sent to him, the defendant had effectively affirmed that the transactions were properly carried out and was estopped from denying the same.

[26] Reverting to the factual background herein, if these goods had indeed not been received by the defendant, there could have been no doubt that this crucial issue would have been raised in the statement of defence specifically and not by way of bare denials without condescending upon particulars.

[27] In an action for the price of goods sold and delivered, it is not sufficient for the defendant to merely deny the debt, but he must plead any facts which negative the existence of the debt, as a general denial is bad in law, adding that the defence must condescend upon particulars: per Chong Siew Fai J (later CJ (Sabah & Sarawak)) in *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139 at pp 141I, 143F. (See also *Shell Malaysia Trading Sdn Bhd v Filotek Trading Sdn Bhd*

[1999] 8 CLJ 592 at p 595f-g, per Jeffrey Tan J; *SJ Securities Sdn Bhd v Sahara bte Harun* Civil Suit No 22–10 of 1995 High Court Shah Alam, 2(3) Mallal's Digest (4th Ed) para 5893; *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at pp 2991 and 289A–C per Gopal Sri Ram JCA, referring to *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at p 487 per Edgar Joseph Jr J (later FCJ) and *Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd* [2003] 4 MLJ 441 per Richard Malanjum JCA).

CONCLUSION

[28] Having regard to the appeal record and the submissions before me, I hold that the learned sessions court judge has erred by dismissing the plaintiff's application for summary judgment in the sum of RM25,111.05 as stated in the notice of application. I therefore allow this appeal with costs, set aside the order of the court below and enter summary judgment for the plaintiff in terms of the notice of application.

Appeal allowed with costs.

Reported by Sally Kee